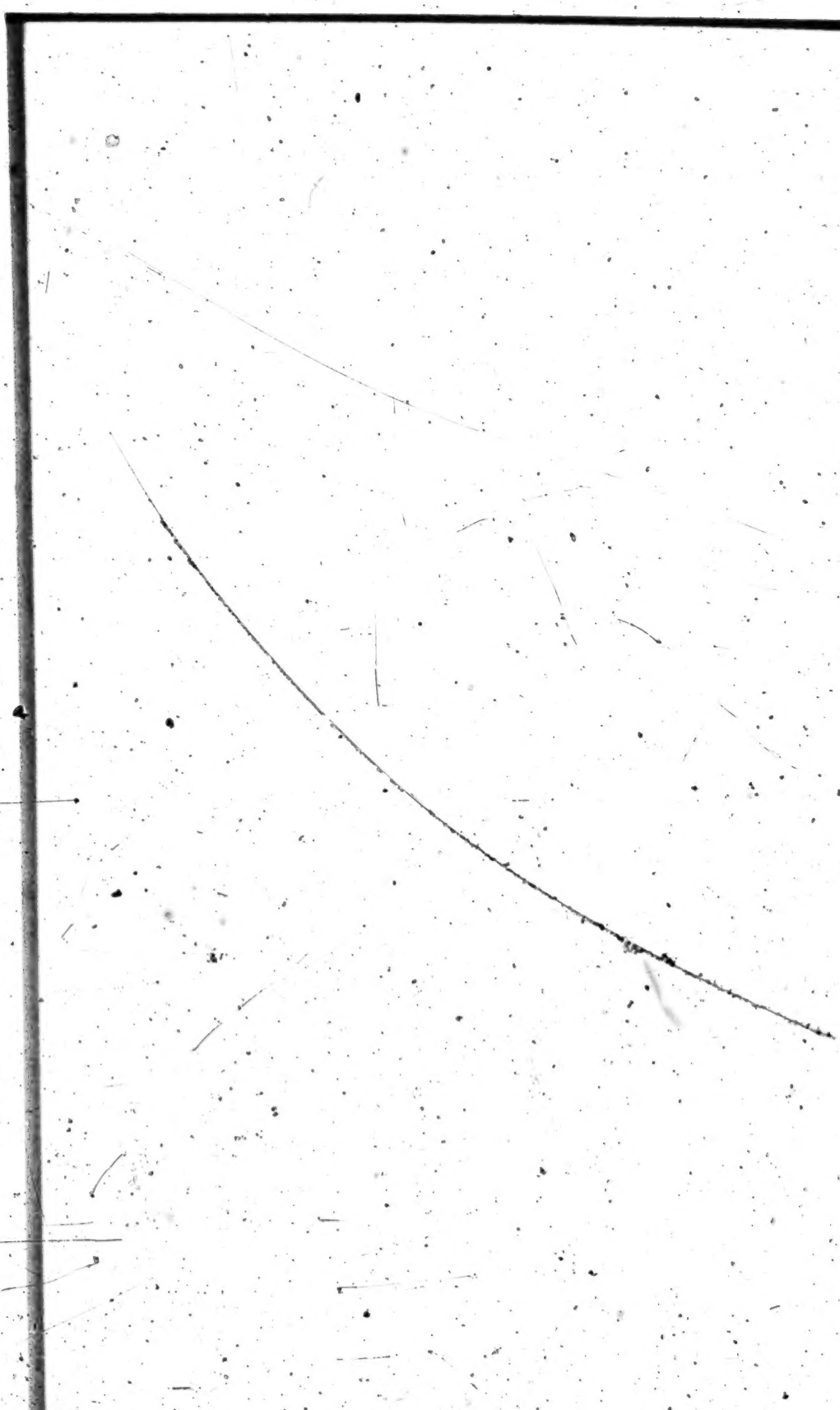

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-404

LEWIS COLTEN ---------- Appellant

vs.

COMMONWEALTH OF KENTUCKY ---------- Appellee

APPEAL FROM THE COURT OF APPEALS OF THE COMMONWEALTH OF KENTUCKY

BRIEF FOR THE APPELLEE

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LEWIS COLTEN ..... *Appellant*

vs:

COMMONWEALTH OF KENTUCKY ..... *Appellee*

APPEAL FROM THE COURT OF APPEALS OF THE COMMONWEALTH OF KENTUCKY

BRIEF FOR THE APPELLEE

QUESTIONS PRESENTED FOR REVIEW

I. Is the Kentucky Disorderly Conduct Statute [KRS 437.016 (1) (f)] which provides "A person is guilty of disorderly conduct if, with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof, he: congregates with other persons in a public place and refuses to comply with a lawful order of the police to disperse," unconstitutional?

II. Does Kentucky's system of allowing a trial *de novo* in the Circuit Court (General Jurisdiction) from a judgment in Quarterly Court (Court of Limited Jurisdiction) chill the right to appeal and deprive one of any constitutional rights?

STATEMENT OF THE CASE

On March 3, 1970 appellant, *Lewis Colten*, was arrested at the Lexington Bluegrass Airport in Fayette County, Kentucky and charged with disorderly conduct under KRS 437.016. The Commonwealth believes that a brief resume' of the facts upon which *Colten* was adjudged guilty will be helpful to this court and enable it to see beyond the elaborate smoke screen which has been built up to hide the simple issue involved in this case.

Trooper *John R. Miller* of the Kentucky State Police, on March 3, 1970 at the Bluegrass Airport, directed a car driven by one *Guy Mendez* to pull over to the side of the road (App. 5). *Colten*, upon seeing this, pulled his car off the road and parked behind the trooper's car (App. 6, 45). *Colten* got out of his car and approached trooper *Miller* and proceeded to ask why the *Mendez* vehicle had been stopped (App. 6, 7) and was told that the vehicle had expired license plates and a traffic citation was going to be issued (App. 6). After this explanation, *Colten* was asked to go back to his car and clear the area (App. 7), but he refused to do so and kept interfering with trooper *Miller* (App. 7), finally necessitating *Miller's* return to his cruiser with *Mendez* in order to prepare the citation without *Colten's* interference (App. 7). By this time additional police cars and non-police cars arrived and proceeded to pull over, thereby creating a traffic problem (App. 16, 27, 34 - 36). The police officers attempted to clear up the traffic problem and disperse the crowd. Several officers told *Colten* to leave but he steadfastly refused to do so. Finally, Trooper *Harlowe* of the Kentucky State Police told *Colten* to leave and upon being informed that he *(Colten)* was going to stay around and see what happened (App. 35), *Harlowe* arrested *Colten* and charged him with disorderly conduct (App. 35).

Colten's trial in Fayette Quarterly Court on March 6, 1970 resulted in a finding of guilty and a fine of ten dollars plus costs. Upon a trial *de novo* in the Fayette Circuit Court on April 24,

1970, *Colten* was again found guilty and a fine of fifty dollars was imposed. The Kentucky Court of Appeals affirmed on May 21, 1971. It is from that judgment that this appeal is prosecuted.

SUMMARY OF ARGUMENT

I. Appellant has challenged the Kentucky Disorderly Conduct statute for overbreadth and/or vagueness. The contested statute, KRS 437.016 (1)(f), which states:

> "A person is guilty of disorderly conduct if, with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof, he: congregates with other persons in a public place and refuses to comply with a lawful order of the polic to disperse."

clearly defines the conduct proscribed, *State* v. *Harriss,* 347 U.S. 612; *United States* v. *National Dairy Prod. Corp.*, 372 U.S. 29, and is not couched in such terms that men of common intelligence must necessarily guess at its meaning and application. *Connally* v. *General Construction Co.*, 269 U.S. 385.

Appellant further challenges the statute on the ground that it stifles freedom of speech and/or assembly. In order to challenge a statute on this ground, one must stand in the guard of the proper exercise of those freedoms. Appellant has no such standing. He was not engaging in any protected conduct and he was not convicted for any such conduct. Simply stated, he was convicted because he was guilty of disorderly conduct as proscribed by KRS 437.016 (1)(f).

II. The imposition of a greater punishment upon a trial *de novo* is not violative of any constitutional right. In a trial *de novo,* the accused and the government participate in a trial which has no reference to the plea, evidence, decision, judgment or sentence of the lower court. It is imperative that the state and the accused start at parity in the trial *de novo* and therefore a restriction as to the imposition of punishment cannot be put on the *de novo* forum.

ARGUMENT

I.

THE KENTUCKY DISORDERLY CONDUCT STATUTE [KRS 437.016 (1) (f)] WHICH PROVIDES "A person is guilty of disorderly conduct if, with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof, he: congregates with other persons in a public place and refuses to comply with a lawful order of the police to disperse," IS NOT UNCONSTITUTIONAL.

The application of the statute in the case at bar may be more clearly understood by dividing the statute into its three components.

First, was there an intent to cause public inconvenience or annoyance (or recklessly create a risk thereof)? The requisite intent is clearly evident by the fact that *Colten* stopped his car on a public road, creating a traffic hazard, and began questioning the police officer as to why the *Mendez* car had been stopped. *Colten* clearly intended to stop his car and clearly intended to question the officer. *Colten's* continued refusal to leave after being told to do so clearly shows his intent to disobey the lawful orders of the police. This, at the very least, created a risk of public inconvenience by causing traffic to congest.

Second, did *Colten* congregate with others in a public place? There was an abundance of testimony, from both sides, that a crowd was gathering (Appellant's brief, 7). In KRS 437.011 "public place" is defined and that definition includes "a place to which the public has access, and includes but is not limited to highways, * * *."

Lastly, did Colten fail to disperse upon a lawful order of the police? There is no question that Colten was asked and then told some nine or ten times to leave and that he continually refused.

Thus, it is readily apparent that appellant was not convicted because he was engaging in speech, dissemination of ideas, or peaceful assembly, but because the Fayette Quarterly Court found beyond a reasonable doubt that appellant was guilty of disorderly conduct. And as indicated in the lower court, the law under which he was convicted was not one regulating dissemination of ideas, but rather the offense of disorderly conduct. Under these circumstances, we do not believe the occasion is presented for this Court to consider the claim of overbreadth. See the discussions in *Dombrowski* v. *Phister*, 380 U.S. 479; *United States* v. *National Dairy Prod. Corp.*, 372 U.S. 29; *Thornhill v. Alabama*, 310 U.S. 88.

We believe this case is occasion for application of the rule that a person to whom application of a law is constitutional will not be held to attack it on the ground that it may be taken as applying to other persons or other situations. *United States v. Raines*, 362 U.S. 17.

By looking at the Fayette Quarterly Court decision, one can easily determine that appellant was convicted for failing to obey a lawful order of the police to disperse, not for engaging in any protected conduct.

> "I think on the basis of the testimony, and trying to weigh it completely, and listen carefully to all of it, that the Court will have to find that the defendant is guilty of the offense of disorderly conduct in his failure to leave the premises."

> "I think the evidence, as I say, is sufficient to find the defendant guilty of the disorderly conduct statute, which says that 'with intent to cause public inconvenience, annoyance or alarm, or recklessly creating the risk thereof,' he obstructs vehicular or pedestrian traffic, or 'congregates with other persons in a public place and refuses to comply with a lawful order of the police to disperse.'" Jurisdiction Statement 14a.

The trial court correctly conceived the issue when it stated" . . . so it comes down to the question and the single question, was there disorderly conduct by the defendant on this occasion." (Jurisdictional Statement 13a).

Appellant has based his objection to the Kentucky Disorderly Conduct statute on the grounds that it is so overly broad and/or vague that it stifles freedom of speech and assembly. As stated above, the question of stifling of freedom of speech and/or assembly, *as applied to the facts in this case*, is not present as *Colten* was not attempting to exercise either of these freedoms. Every case cited by appellant in support of an abrogation of freedom of speech involved a legitimate exercise of that freedom. A person attempting to disseminate ideas whether they be pro or con to the general beliefs of society is guaranteed his right to do so. *Colten* was not arrested for attempting to exercise his right to free speech, he was arrested because he refused to leave when he was told to do so. Likewise, all cases cited by appellant in support of freedom of assembly show a purpose for that assembly. Most, if not all, cases involving the freedom to assemble evidence a purpose for that assembly. People assemble to disseminate ideas to others or to demonstrate for or against someone or something. *Colten* stopped for the sole purpose of interfering with the police.

To apply appellant's logic would be to authorize any person to pull off the road behind a police car which had stopped a traffic violator and proceed to approach the police officer for the purpose of asking why he had stopped that particular car. This situation would seem ludicrous in the daylight but what would happen if it were 2:00 a.m. on a deserted country road and a policeman saw a strange vehicle pull up behind his cruiser and three or four people get out and start to approach him?

Or to pursue appeallant's logic to its extreme, would he permit an individual to approach an officer, engaged in a gun battle

with a bank robber, for the purpose of exercising his freedom of speech by asking the officer why he was shooting at that particular person?

There are certain times when first amendment rights must be regulated to insure the public order. See e.g. *United States* v. *O'Brien*, 391 U.S. 367; *Cox* v. *Louisiana*, 379 U.S. 536, where this court stated:

> "• • • The rights of free speech and assembly, while fundamental in our democratic society, still do not mean that everyone with opinions or beliefs to express may address a group at any public place at any time. The constitutional guarantee of liberty implies the existence of an organized society maintaining public order, without which liberty itself would be lost in the excesses of anarchy. The control of travel on the streets is a clear example of governmental responsibility to insure this necessary order. • • •" 379 U.S. 536 at 554.

The Kentucky Court of Appeals, in affirming the lower court held:

> "In the instant case the evidence warranted the conclusion that Colten was not undertaking to exercise any constitutionally protected freedom. He was not exercising the right of freedom of speech because that right is concerned with expression of thought or dissemination of idea. See Smith v. California, 361 U.S. 147, 80 S. Ct. 215, 4 L.ed.2d 205. Colten was not seeking to express a thought to any listener or to disseminate any idea. He simply was trying to irritate the police by his presence and by efforts at interruption. Nor was he exercising the right of peaceable assembly, because that right, we believe, contemplates that the assembly is for some *bona fide* purpose other than merely to assemble, and Colten's group appears to have had no purpose other than to cause inconvenience, and annoyance so the statute as applied here did not chill or stifle the exercise of any constitutional right." 467 S.W.2d at 378.

The Commonwealth submits that under certain circumstances first amendment rights to free speech and assembly must be subjected to regulation to maintain the public order and tranquility. See e.g. *Amalgamated Food Employees Union* v. *Logan Valley Plaza, Inc.*, 391 U.S. 308; discussions in *Edwards* v. *South Carolina*, 372 U.S. 229; *Cameron* v. *Johnson*, 390 U.S. 611.

This necessary regulation is what the Kentucky Court of Appeals applied when it mentioned the balancing of interests. Appellant has placed great reliance on the language of the Court and by applying this language out of context, completely twisted around the holding of the Kentucky Court. By a simple insertion of the facts of this case into the language of the Kentucky Court, one can achieve miraculous clarification:

> "• • • where the interest which the individual seeks to advance *(i.e. Colten's repeated attempts to interfere with the police)* through exercise of freedom of speech is minuscule in comparison with the public's interest in being protected from the consequences of that exercise *(i.e. traffic congestion)*, the public's interest should prevail even though the harm the public might be exposed to is no more than inconvenience or annoyance *(i.e. — being tied up in traffic for awhile)*." 467 S.W.2d 377 *insertions added*

The balancing concept must be carried a bit farther in this case. It is uncontroverted that *Colten* asked the policeman why he had stopped the *Mendez* vehicle. *Colten* recevied a specific answer from the trooper. Somewhere between this exchange of questions and answers and *Coltens'* arrest, his freedom of speech invaded the rights of the public. If Colten had merely asked the officer this question, returned to his car and not caused a crowd to gather and obstruct traffic, the Commonwealth might well agree that he was participating in protected conduct, but he was neither arrested nor convicted for engaging in any protected conduct. However, continued persistence in remaining in a place which had become a traffic problem after being told to leave eight

or ten times certainly removed Colten from the protectiveness of his first amendment rights. In other words, Colten's own conduct tipped the balance against him.

II.

KENTUCKY'S SYSTEM OF ALLOWING A TRIAL DE NOVO IN THE CIRCUIT COURT (General Jurisdiction) FROM A JUDGMENT IN QUARTERLY COURT (Court of Limited Jurisdiction) DOES NOT CHILL THE RIGHT TO APPEAL AND DEPRIVE ONE OF ANY CONSTITUIONAL RIGHTS.

Appellant's argument that an increase in punishment upon a trial *de novo* is unconstitutional is based upon *North Carolina* v. *Pearce*, 395 U.S. 711. It is readily apparent from the *Pearce* opinion that it was not intended to apply to a trial *de novo*. The language of this Court illustrates this:

> "the constitutional limitations upon the imposition of a more severe punishment after conviction for the same offense upon *retrial*." 395 U.S. at 716.
>
> "what constitutional limitations there may be upon the general power of a judge to impose upon a *reconviction* a longer prison sentence . . ." 395 U.S. at 719.
>
> "a man who is *retried* after his first conviction has been set aside. . ." 395 U.S. at 722.

Thus, *Pearce* is applicable only where a person receives a reversal of his case and is retried. There is no chance of this even happening in the trial *de novo* situation. An appeal connotes that the judgment is prosecuted to a higher court in order to determine if the lower court's judgment was correct in both the application of the law and conduct of the trial.

When a trial *de novo* is obtained, nothing that occurred in the Quarterly Court is available to the Circuit Court. A trial *de novo* is a matter of right and is entirely independent of the decision below. The Commonwealth cannot seek a trial *de novo;* the defendant must actively request it. Indeed, a person can plead guilty in Quarterly Court and turn right around and seek trial *de novo* in the Circuit Court and enter a plea of not guilty.*

One does not have to stretch the imagination too far to conceive of the situation where a defendant enters a plea of guilty in the Quarterly Court, offers mitigating circumstances, and receives a suspended sentence and/or fine. This same defendant could then walk out the door, around the corner, and file for a trial *de novo*. He could then plead not guilty and request a jury trial. To follow appellant's logic would dictate that if he was again found guilty, he could receive nothing more than suspended punishment. This example is entirely within the realm of possibility and would occur if *Pearce* was held to include a *de novo* trial.

The first Circuit Court of Appeals has held that an increase in punishment following a trial *de novo* is not violative of *Pearce*. *Lemieux* v. *Robbins*, 414 F.2d 353 (1st Cir. 1969) cert. denied, 397 U.S. 1017 (1970). The fourth Circuit has held that *Pearce* is applicable: *Rice* v. *North Carolina*, 434 F.2d 297 (4th Cir. 1970), reversed on other grounds 30 L.ed. 2d 413 (1972).

In *Mann* v. *Commonwealth*, 271 N.E.2d 331 (Mass. 1971), the Supreme Judicial Council of Massachusetts presented an excellent discussion of why a superior court must possess the right to impose a heavier sentence upon trial *de novo*. See also *Evans* v. *City of Richmond*, 171 S.E.2d 247 (1969).

*Under Kentucky law one can plead guilty in a Quarterly Court and still obtain a trial *de novo*, as a matter of right, in the Circuit Court *Brown v. Hoblitzell*, Ky., 307 S.W.2d 739, (1956).

Our research indicates that presently twenty states provide a trial *de novo* system similar to the one in Kentucky.[1]

The trial *de novo* system serves an important function in our judiciary system in that it allows one to proceed in a court of limited jurisdiction or a court of *convenience*. There are thousands of people every day who have such cases as traffic offenses and misdemeanors and wish to expediently conclude their minor brush with the law. However, if a person feels that he was wronged or didn't get a fair shake in the lower court, he can have a *de novo* trial in the court of general jurisdiction. As stated previously, this *de novo* trial is entirely independent of the lower court's judgment. But if the *de novo* trial were restricted in the application of punishment it would cease to exist. This would work a serious hardship both upon the public and the judiciary system.

[1]ARIZONA—A.R.S. § 22-374; ARKANSAS—Ark. Stat. §§§ 44-501; 502 and 509; COLORADO—Rule 37 (f) COLO. Rules of Crim. Pro.; FLORIDA—Constitution of Florida, Art. V, §§ 11(2) and 6(3). See also F.S.A. §§§§ 932.53, 54, 55 and 56; INDIANA—Burns' Ind. Stat. Ann. § 9-721. See also PEELE v. STATE, 161 Ind. 378, 68 N.E. 682, and HARLAN v. State, 190 Ind. 332, 130 N.E. 413; KANSAS—K.S.A. § 22-3610. See also STATE v. COULTER, 40 Kan. 87, 19 P. 368 (1888), and STATE v. FORNER, 32 Kan. 281, 4 P. 357 (1884); KENTUCKY—K.R.S. § 23.032 and Rule 12.06 Ky. Rules of Crim. Pro. See also DRESSMAN v. COMMONWEALTH, 204 Ky. 668, 265 S.W. 3 (1924); MAINE—Me. Rules of Crim. Pro., Dist. Ct. Rules 37(a) and 39(a), (b) and (c). See also LEMIEUX v. MAINE, 240 A. 2d 206 (Me. 1968) and LEMIEUX v. ROBBINS, 414 F.2d 353 (1st Cir. 1969), cert. dnd. 397 U.S. 1017 (1970); MICHIGAN—PEOPLE v. OLARY, 382 Mich. 559, 170 N.W. 2d 842 (1969); MISSISSIPPI—Miss. Code §§ 1201 and 1202; MISSOURI—Supreme Court Rule 22 §§ 10 and 11; MONTANA—R.C.M. § 95-2009. WHITE SULPHUR SPRINGS v. VOISE, 136 Mont. 1, 343 P.2d 855 (1959); NEVADA—Rule 76 Justices' Court Pro.; NEW HAMPSHIRE—STATE v. DESPRES, 107 N.H. 297, 220 A.2d 758 (1966). See also N.H.R.S.A. §§§ 502.18, 502A:11 and 12, and 599:1; NORTH CAROLINA—N.C.G.S. §§ 15-177, 177.1, STATE v. BROOM, 153 S.E.2d 384 (1967); NORTH DAKOTA—N.D. Cent. Code §§ 33-12-40 and 41; TEXAS—Vernon's Ann. Code of Crim. Pro. §§ 44.17 and 45.10; UTAH—Utah Code Ann. §§ 78-4-17 and 78-5-14. See also Utah Code Ann. §§ 77-57-43 and 77-27-2; VIRGINIA—Va. Code § 16.1-136. See also EVANS v. CITY OF RICHMOND, 210 Va. 403, 171 S.E. 2d 247 (1969); WEST VIRGINIA—Constitution of W. Va., Article VII, § 28. See also W. Va. Code §§ 50-18-1 and 50-18-10 STATE v. KESSINGER, 144 W. Va. 209, 107 S.E. 2d 367 (1959).

In regard to the claim of double jeopardy, the Commonwealth submits that where a defendant pursues his right to a trial *de novo,* he starts anew as if there had never been a previous trial, and therefore the argument of double jeopardy, applied to the facts in this case, is without merit.

CONCLUSION

The decision of the Kentucky Court of Appeals should be affirmed for two reasons. One, Lewis Colten was found guilty of disorderly conduct. He was not convicted because he was engaging in any protected conduct, but because he congregated with others in a public place, causing a traffic hazard, and refused to obey a lawful order of the police to leave.

Two, the trial *de novo* system of justice plays an important role in our judiciary. It is imperative that the state and the defendant start at parity at such a trial and therefore the *de novo* trial court cannot be restricted in its application of punishment.

Respectfully submitted,

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